

INTERNAL AFFAIRS POLICY & PROCEDURES

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Introduction

Internal Affairs Policy and Procedures was first published in 1991. Updates to the policy were issued in 1992 and 2000. The purpose of the policy is to assist the State's law enforcement agencies with the investigation and resolution of complaints of police misconduct that originate with private citizens or are generated by the supervisors, officers or employees of a law enforcement agency. The goals of the policy are to enhance the integrity of the State's law enforcement agencies, improve the delivery of police services and assure the citizens of New Jersey that complaints of police misconduct are properly addressed.

Since the introduction of the policy, the process we call "internal affairs" has come under increasing scrutiny by the courts, the community and the media. In fact, it would be fair to say that the proper administration of the internal affairs function by the State's law enforcement agencies is a critical issue for the criminal justice system in New Jersey today.

The New Jersey Legislature recognized the importance of the internal affairs function in 1996 with the enactment of *N.J.S.A. 40A:14-181*. The statute provides that:

Every law enforcement agency shall adopt and implement guidelines which shall be consistent with the guidelines governing the "Internal Affairs Policy and Procedures" of the Police Management Manual promulgated by the Police Bureau of the Division of Criminal Justice in the Department of Law and Public Safety, and shall be consistent with any tenure or civil service laws, and shall not supersede any existing contractual agreements.¹

In addition, the courts, particularly the federal courts, have focused on the importance of the internal affairs function. The courts have come to perceive the internal affairs function as an important means of protecting the constitutional rights and civil liberties of the citizens of this State. Under the case law, law enforcement agencies must do three things with respect to the internal affairs function. First, agencies must implement an internal affairs policy that provides for a meaningful and objective investigation of citizen complaints of police misconduct. Second, agencies must monitor and track the behavior of police officers for incidents of misconduct. Third, when officers are found to have engaged in misconduct, agencies must correct the behavior. The courts have with increasing frequency issued decisions that set minimum standards of performance for the internal affairs function.

In view of the above developments, the Attorney General has issued, through the Division of Criminal Justice, this revised and updated version of *Internal Affairs Policy and Procedures*. The revisions attempt to incorporate and reflect the numerous changes that have occurred in law enforcement and the internal affairs function since the policy was first issued in 1991. The revised policy is also designed to assist law enforcement agencies in their efforts to comply with emerging legal principles governing the internal affairs function.

It is important for State, county and municipal law enforcement agencies to recognize

¹ *N.J.S.A. 40A:14-181*

that as they conduct internal affairs investigations, they do so under the general supervision of the Attorney General. The Criminal Justice Act of 1970 designates the Attorney General as the State's chief law enforcement officer. (N.J.S.A. 52:17B-98) As such, the Attorney General is responsible for the general supervision of the State's law enforcement agencies in order to provide for the efficient administration of the criminal justice system. Subordinate law enforcement agencies, including county and municipal police forces, have a duty to cooperate with the Attorney General in order to improve the administration of the criminal justice system including the efficient delivery of police services. For county and municipal law enforcement agencies, cooperation in internal affairs matters begins with strict adherence to the requirements set forth by the Attorney General's policy.

County and municipal law enforcement agencies must also recognize that they conduct internal affairs investigations, particularly those investigations that involve allegations of criminal conduct, under the direct supervision of the county prosecutors. County and municipal law enforcement agencies must inform the appropriate county prosecutor when allegations of police misconduct involve potential criminal conduct. In addition, county and municipal law enforcement agencies must confer with and follow the instructions given by the county prosecutor at all critical points in the investigative process. This is particularly true when the agency is in the process of gathering evidence, including the taking of statements, concerning allegations of criminal conduct.

The revised policy contains several mandates which, at the direction of the Attorney General, must be implemented by every law enforcement agency. However, the manner in which these mandates must be implemented is a decision that is left to discretion of individual law enforcement agencies. For instance, every agency must establish an internal affairs function. However, the manner in which the mandate is satisfied is a decision that is left to the discretion of the individual agencies. Individual agencies shall decide based on the characteristics of their jurisdiction and the workload of their agency whether the internal affairs function is a full or part-time unit and how many officers are assigned to work in the unit.

Other policy requirements which the Attorney General has determined are critical in nature and must be implemented by every law enforcement agency include the following:

- Each agency must establish by written policy an internal affairs function.
- Each agency must accept reports of officer misconduct from any person, including anonymous sources, at any time.
- Where preliminary investigation indicates the possibility of a criminal act on the part of the subject officer, the county prosecutor must be notified immediately. No further action should be taken, including the filing of charges against the officer, until directed by the county prosecutor.
- The agency must notify the county prosecutor immediately of any use of force by an officer that results in death or serious bodily injury.
- Each agency must thoroughly and objectively investigate all allegations against

its officers.

- Each agency must notify its officers of complaints and their outcomes.
- Each agency must notify complainants of the outcome of their complaint.
- Each agency must establish and maintain an internal affairs records system which, at a minimum, will consist of an internal affairs index system and a filing system for all documents and records. In addition, each agency shall establish a protocol for monitoring and tracking the conduct of all officers.
- Each agency must submit periodic reports to the county prosecutor summarizing the allegations received and the investigations concluded for that period. Each county prosecutor shall establish a schedule for the submission of the reports and specify the content of the reports.
- Each agency must periodically release reports to the public summarizing the allegations received and the investigations concluded for that period. These reports shall not contain the identities of officers or complainants. In addition, each agency shall periodically release a brief synopsis of all complaints where a fine or suspension of ten days or more was assessed to a member of the agency. The synopsis shall not contain the identities of the officers or complainants.
- Each agency shall ensure that officers assigned to the internal affairs function complete training as mandated by the Division of Criminal Justice.

The above represent critical performance standards that must be implemented by every State, county and municipal law enforcement agency. Agencies that make a vigorous commitment to the internal affairs process signal their desire to comply with the highest standards of professionalism in law enforcement. In addition, they ensure that their officers will be accountable for their actions to both the agency and the community. Agencies that fail to make a vigorous commitment to the internal affairs process run the risk of failing to uncover policies, practices and procedures that may undermine legitimate efforts to provide law enforcement services of the highest quality.

Indifference to the internal affairs function will have a negative impact on the administration of criminal justice and the delivery of police services to the citizens of this State. Agencies that fail to make the internal affairs function a priority can lose the respect and support of the community. The integrity of individual law enforcement agencies as well as the reputation of the State's criminal justice system can also suffer if agencies fail to identify and correct officer misconduct. In addition, law enforcement agencies that fail to implement a meaningful and objective internal affairs process may be found liable in civil lawsuits for their failure to effectively address officer misconduct. It is for these reasons that the Attorney General has issued this revised policy and directed the critical mandates set forth by the policy be implemented by the State's law enforcement agencies.

This revised policy, the procedures set forth in the policy and the legal citations contained in the text are primarily intended for implementation by county and municipal law enforcement agencies including municipal and county police forces, county sheriff's offices, county prosecutors' offices, campus police forces and State police forces. Other law enforcement agencies are advised to consult with their legal advisor before implementing specific provisions of the policy. Agencies not under the supervision of the Attorney General as set forth in the Criminal Justice Act of 1970 and/or whose primary mission does not include the enforcement of the criminal laws of this State (e.g. State and county juvenile justice agencies, State and county correctional agencies, county probation agencies, State parole agencies, interstate law enforcement agencies), are under no obligation to implement the provisions of this policy. In the event these agencies choose to adopt the provisions of this policy for their own use, they do so cognizant that one or more of the provisions of this policy may be unsuitable for implementation by their agency and/or one or more of the legal citations contained in the policy may be inapplicable to their agency. These agencies should consult with legal counsel before implementing one or more provisions of this policy.

Fundamentals of the Disciplinary Process

Achieving the desired level of discipline within the law enforcement agency is among the most important responsibilities of the law enforcement executive. Yet this is one of the most frequently neglected processes within many law enforcement agencies. While the word “discipline” was originally defined as instruction, teaching or training, its meaning has shifted toward a concept of control through punishment. This emphasis on control has resulted in discipline being viewed as a negative threat rather than a mechanism for remediation and improvement. Too frequently rules of conduct and disciplinary procedures are used as an end in themselves, and their purpose in reaching department goals is forgotten. Focusing on the negative aspects of discipline diminishes officer morale and productivity.

The first step toward positive discipline is to emphasize instruction and de-emphasize control. This requires the law enforcement executive to focus on organizational practices. The executive must first define the goals and objectives of the agency's units, and then announce management's expectations to guide the units toward the realization of those goals. The law enforcement executive must establish a means to monitor performance and to correct improper actions.

This approach to management as it relates to discipline insures that all subordinates know and understand what must be done, why it must be done, how it must be done, and when it must be done. Employees must be clearly told what constitutes satisfactory performance through performance evaluations and similar procedures. N.J.A.C. 4A:6-5.1. In addition, supervisors and managers must know when and how to take corrective action. To achieve this, management must establish workable procedures for documenting all expectations and advising individuals of their duties and responsibilities.

Policy Management System

The agency's policy management system serves as the foundation for effective discipline. A clearly defined policy management system is designed to move the organization toward its stated goals and set the standard for acceptable performance. The system must incorporate a mechanism for the distribution of rules and regulations, policies and procedures, and provide for periodic review and revision as necessary. The system should include a classification and numbering system which facilitates cross-referencing where necessary.

Law enforcement agencies should have a policy management system that, at a minimum, includes:

1. Rules and regulations: Principles of behavior that set forth acceptable and unacceptable conduct. In municipal police departments, the rules and regulations must be issued by the appropriate authority as designated by ordinance.²

²N.J.S.A. 40A:14-118

2. Standard Operating Procedures (S.O.P.): Written statements providing specific direction for performing agency activities. Each S.O.P. should also include the department's policy in that area, which is a statement of agency principles that provides the basis for the development of the procedures.
3. Directives or orders: Documents detailing the performance of a specific activity or method of operation.

The policy management system should clearly and explicitly state management's intentions. Employees must understand what management wants to accomplish and what behavior is expected. Each category of documents in the policy management system should be issued in a distinctive, readily identifiable format.

Rules and Regulations

The agency's rules and regulations should form a "code of conduct" for employees. It should contain the broadly stated "do's and don'ts," without delving into specific details. For instance, an agency's rules and regulations should state that any use of force by an officer must comply with state and federal law, the Attorney General's and the county prosecutor's policies, and the agency's S.O.P.s. The specific details of what is considered force, and what constitutes the acceptable use of force, should be found in the agency's use of force S.O.P.

The rules and regulations should identify general categories of misconduct or inappropriate behavior that are subject to disciplinary action. An incident of misconduct or inappropriate behavior may fall into one or more of the following categories:

Crime: Complaint regarding the commission of an illegal act that constitutes a violation of the criminal code including disorderly and petty disorderly persons offenses.

Excessive force: Complaint regarding the use or threatened use of excessive force against a person.

Improper Arrest: Complaint that the restraint of a person's liberty was improper or unjust, or violated the person's civil rights.

Improper Entry: Complaint that entry into a building or onto property was improper or that excessive force was used against property to gain entry.

Improper Search: Complaint that the search of a person or property was improper, unjust, violated established agency procedures, or violated the person's civil rights.

Differential treatment: Complaint that the taking of police action, the failure to take police action, or method of police action was predicated upon irrelevant factors such as race, appearance, age, or sex.

Demeanor: Complaint that a department member's bearing, gestures, language or other actions were inappropriate.

Serious rule infractions: Complaint for conduct such as insubordination, drunkenness on duty, sleeping on duty, neglect of duty, false statements or malingering.

Minor rule infractions: Complaint for conduct such as untidiness, tardiness, faulty driving, or failure to follow procedures.

In addition, the rules and regulations should set forth a schedule of possible penalties an officer might receive when discipline is imposed. The rules and regulations may incorporate a system of progressive discipline. Progressive discipline serves an important role in the process by which the agency deals with complaints of misconduct or inappropriate behavior. In lieu of discipline, counseling, re-training, enhanced supervision, oral reprimands and performance notices can be used as instructional or remedial devices to address deficiencies or inadequate performance.

In providing a range of penalties, the department can use the disciplinary process to achieve the basic goals of instruction and address inappropriate behavior before minor problems escalate into major problems. At the same time, the subject officer is made aware that repeated violations of the agency's rules will result in progressive discipline. An internal affairs complaint that has a disposition of exonerated, unfounded, or not sustained should not be used to effect progressive discipline.

A system of progressive discipline can include the following elements:

1. Oral reprimand or performance notice
2. Written reprimand
3. Monetary fine³
4. Suspension without pay
5. Loss of a promotional opportunity
6. Demotion
7. Discharge from employment

The disciplinary process should be thoroughly explained in the agency's rules and regulations, including a description of the officer's rights, the identity of the hearing officer, an outline of the hearing process and appeal procedures available to the officer.

An agency's rules and regulations, which include the description of the disciplinary process, shall be distributed to all employees. The agency should document that this distribution has taken place. In addition, a copy of the rules and regulations and a copy of the department's internal affairs S.O.P. shall be made available to a representative of any collective bargaining unit for employees.

³ Agencies operating under Civil Service Commission statutes (*N.J.S.A. 11A:2-20*) and regulations may only assess a fine in lieu of a suspension where loss of the officer from duty would be "detrimental to the public health, safety or welfare" or if the assessment is restitution or is agreed to by the employee.

Prevention of Misconduct

Prevention is the primary means of reducing and controlling inappropriate behavior and misconduct. While disciplinary actions are properly imposed on officers who engage in wrongdoing, they are of limited utility if they shield or obscure organizational conditions which permit the abuses to occur. Too often, inadequate training and a lack of appropriate guidance are factors that contribute to inappropriate behavior and misconduct. An agency should make every effort to eliminate the organizational conditions which may foster, permit, or encourage inappropriate behavior by employees. In the furtherance of this objective, special emphasis should be placed on the following areas.

Recruitment and Selection

Selecting and appointing the highest quality individuals to serve as law enforcement officers must be a priority of every law enforcement agency. During the selection process, written tests, psychological tests, background investigations and individual interviews should be completed by each candidate in an attempt to identify those who would be best suited for law enforcement employment. These procedures may also be used for promotional testing, as well as assignment to especially sensitive responsibilities or those that pose the greatest opportunities for abuse or wrongdoing. Each agency should establish policies and procedures for recruitment, oral and written examinations, selection and the promotional process.

Training

Basic and in-service training for law enforcement officers should emphasize the sworn obligation of those officers to uphold the law and provide for the public safety of the citizenry. Police ethics should be a major component in the training curricula. In addition, the rules, regulations, policies and procedures of the agency, including the disciplinary process, should be stressed. There must also be a process to advise veteran officers of any new statutory requirements or significant procedural changes.

An agency's supervisory personnel should always consider the need for training when officers engage in inappropriate behavior or misconduct. The question should be, "Could training have prevented this behavior, and can training prevent it from happening in the future?" Perhaps a particular officer or group of officers need a refresher course in a certain subject. In addition, changes in the law, the agency, or even within the community may give rise to the need for a type of training never before given to the officer or department.

Training in this sense can be anything from informal counseling of an officer about a particular policy or procedure, through formal department-wide training. The department may also take advantage of training offered by other agencies, including police academies, the county prosecutors, the Division of Criminal Justice, other public or private entities or web-based programs.

Supervision

Proper supervision is critical to the discipline and management of a law enforcement

agency. To maximize their effectiveness, agency supervisors should receive appropriate supervisory training as close as possible to the time of their promotion. Emphasis should be placed on anticipating problems among officers before they result in improper performance or conduct. Supervisors are expected to recognize potentially troublesome officers, identify training needs of officers, and provide professional support in a fair and consistent manner.

Staff Inspections

While the primary responsibility for enforcing department policies rests with the line supervisors, management cannot rely solely on those supervisors for the detection of violations. Administrators should establish a mechanism to determine whether an agency's policies and procedures are being properly implemented. It is necessary for management to know if behavior is, in fact, consistent with the agency's rules and regulations, policies and procedures. The task of detecting such defects should be delegated to an inspection unit or function.

Large agencies might establish an inspection unit operating directly out of the office of the law enforcement executive. Small and medium size agencies can successfully accomplish this function by periodically assigning the inspection task to selected unit supervisors. Individuals so assigned must be of unquestioned integrity and hold sufficient rank to achieve the objectives of the inspection function.

The inspection function should determine by actual on-site inspection whether management's policies are being properly implemented by personnel at the operational level. This function is also responsible for reviewing and evaluating procedures. In addition, the inspection unit or function should evaluate the material resources of the department and the utilization of those resources. This includes but is not limited to motor vehicles, communications equipment, computers, office machinery and supplies. The inspection function or unit should report any deficiencies to the law enforcement executive, as well as recommend any possible solutions and improvements.

Community Outreach

Commanding officers should strive to remain informed about and sensitive to the needs and problems of the community. Regularly scheduled meetings to discuss community concerns should be held with citizen advisory councils, religious groups, schools, businesses and other community leaders. These meetings help commanding officers identify potential crisis situations and keep channels of communication open between the agency and the community. The disciplinary process should be publicized and clearly explained in these forums.

Responsibility for Discipline

The successful implementation of discipline requires the law enforcement executive to delegate responsibility for the disciplinary process to individual units and supervisors within the agency. Although the levels of authority may vary within an agency's chain of command, the failure to carry out disciplinary responsibilities at any level in the chain of command will contribute to the organization's ineffectiveness. The task of clearly delineating the authority and responsibility to initiate and impose discipline is essential to the administration of the agency.

Every supervisor must establish a familiarity with the agency's disciplinary process and develop an understanding of how to implement specific disciplinary procedures when called upon to deal with inappropriate behavior or misconduct. If a supervisor fails to follow these procedures or avoids his or her responsibility, that supervisor is not conforming to expected behavior and must receive some sort of corrective action. Some supervisors occasionally need to be reminded that the fundamental responsibility for direction and control rests with the immediate supervisor at the operational level, not with the law enforcement executive.

To provide such direction and control, supervisory personnel must be granted the proper authority to carry out their responsibilities. In order to properly exercise this authority, supervisory personnel must be fully familiar with applicable agency rules and regulations. Based on the size and needs of the individual agency, supervisory personnel may be permitted to impose specific disciplinary measures (subject to approval of the law enforcement executive) including oral reprimands or performance notices, written reprimands, and suspensions. In addition, the supervisor should be permitted to make written recommendations for other disciplinary actions. The extent of this authority must be clearly stated in the agency's disciplinary rules and regulations.

Fitness for Duty

One of the areas which often involves internal affairs is an employee's fitness for duty. This is not exclusively an internal affairs issue, since an officer's fitness may be impacted for reasons other than misconduct. For instance, an officer may become unfit for duty because of a medical problem unrelated to the job. There are occasions, however, when internal affairs may be called upon to assist in determining whether or not an officer is fit for duty.

It is incumbent upon a law enforcement agency to ensure that its members are fit to safely and effectively perform the duties of their profession. If, for whatever reason, an officer's fitness for duty is questioned, it is necessary that the agency have the officer evaluated by competent professionals to make a determination of fitness. If a law enforcement executive, commander, supervisor, or internal affairs investigator has reasonable concerns about the fitness for duty of an officer, they are obligated to begin the process necessary to obtain that evaluation. If the officer in question is obviously unfit for duty, the officer in authority may effect an immediate suspension pending the outcome of the evaluation and investigation. (See "Immediate Suspension Pending Investigation and Disposition" on page 18.)

Internal Affairs Unit

Requirement 1

Every law enforcement agency must establish, by written policy, an internal affairs function or unit within the agency.

Every law enforcement agency shall establish an internal affairs unit or function. Depending upon the need, the internal affairs unit can be full or part-time. In either case, this requires the establishment of a unit or the clear allocation of responsibility and resources for executing the internal affairs function. The unit will consist of those personnel of the department assigned to internal affairs by the law enforcement executive. Personnel assigned to the internal affairs unit serve at the pleasure of and are directly responsible to the law enforcement executive or the designated internal affairs supervisor.

Duties and Responsibilities

The purpose of the internal affairs unit is to establish a mechanism for the receipt, investigation and resolution of complaints of officer misconduct. The goal of internal affairs is to insure that the integrity of the department is maintained through a system of internal discipline where fairness and justice are assured by an objective and impartial investigation and review.

The internal affairs unit or officer will conduct investigations of alleged misconduct by members of the department and review the adjudication of minor complaints handled by supervisors. In addition, internal affairs shall be notified of and document all firearms discharges by department personnel that are not related to training, all use of force incidents that result in injury to a defendant or a third party, all vehicular pursuits undertaken by department personnel and all collisions involving department vehicles. Once notification has been received, internal affairs will determine whether additional investigation is necessary.

An internal affairs unit has an obligation to investigate or review any allegation of employee misconduct that is a potential violation of the agency's rules and regulations or which indicates that the employee is unable, unwilling or unfit to perform his or her duties. The obligation to investigate includes not only acts of misconduct that are alleged to have occurred while the subject officer was on-duty, but also acts of misconduct that are alleged to have occurred outside the employing agency's jurisdiction or while the subject officer was off-duty.

An internal affairs unit may conduct an internal investigation on its own initiative upon notice to, or at the direction of the law enforcement executive or the internal affairs supervisor. Internal affairs may refer investigations to the employee's supervisor for action as permitted by department policy and procedures.

Internal affairs investigations must be considered as important to the agency as any criminal investigation. Therefore, members of the internal affairs unit should have the authority to interview any member of the agency and to review records and reports of the agency relative

to their assignment. In addition, the agency's personnel should be instructed that the internal affairs unit acts at the behest of the law enforcement executive in all internal affairs investigations. The agency's personnel should be further instructed that during an internal affairs investigation, every member of the agency, regardless of rank, shall treat an order or a request from a member of the internal affairs unit as if the order or request came directly from the law enforcement executive.

The internal affairs unit shall maintain a comprehensive central file on all complaints received, whether investigated by internal affairs or assigned to the officer's supervisors for investigation and disposition. In addition, internal affairs should establish protocol for tracking all complaints received by the agency and the conduct of all officers. The protocol must include criteria for evaluating the number of complaints received by the agency and the number of complaints filed against individual officers.

Selection of Personnel for the Internal Affairs Unit

Personnel assigned to conduct internal affairs investigations should be energetic, resourceful and committed to the agency's mission and the internal affairs function. They must display a high degree of perseverance and initiative. The internal affairs investigator must maintain an appropriate balance between professional commitment and personal and group loyalties. Internal affairs personnel must be of unquestioned integrity and possess the moral stamina to perform unpopular tasks. It is important that these investigators possess the ability to withstand the rigors and tensions associated with complex investigations, social pressures and long hours of work. The investigator must possess the ability to be tactful when dealing with members of the department and the community. It is recommended that personnel assigned to the internal affairs unit provide the agency with the opportunity to access all segments of the community. For example, if a particular community has a significant proportion of the population which speaks a foreign language, the law enforcement executive may wish to consider assigning an officer to the internal affairs unit who speaks that language.

Investigations of officer misconduct may proceed in one of two ways. An investigation may be conducted for the purpose of imposing a disciplinary sanction, or an investigation may be conducted for the purpose of initiating a criminal prosecution. The distinction between the two is important in that each type of investigation has differing legal requirements. Consequently, it is important that the internal affairs investigator be familiar with proper investigative techniques and legal standards for each type of proceeding. It is essential that experienced investigators be assigned to internal affairs investigations. Each investigator must be skilled in interviews and interrogation, observation, surveillance and report writing.

Internal affairs investigators should be trained not only in the elements of criminal law, court procedures, rules of evidence and use of technical equipment, but also in the disciplinary and administrative law process. Initially upon assignment, and on an ongoing basis, these investigators should receive training in internal affairs and disciplinary procedures including training required by the Division of Criminal Justice.

Law enforcement executives shall not assign any person responsible for the representation of members of the collective bargaining unit to the internal affairs unit. The

conflict of interest if such an assignment were made would be detrimental to the internal affairs unit, the subject officer, the officer so assigned, the bargaining unit and the department as a whole.

Accepting Reports of Officer Misconduct

Requirement 2

Every law enforcement agency must accept reports of officer misconduct from any person, including anonymous sources, at any time.

Every law enforcement agency shall establish a policy which provides that all citizen complaints are readily accepted and fully and promptly investigated. Allegations of officer misconduct or complaints of inappropriate behavior can alert the law enforcement executive to problems which require disciplinary action or identify the need for remedial training. However, executives must also recognize that complaints from the public provide them with an invaluable source of feedback. Complaints from the public, whether substantiated or not, increase the executive's awareness of actual or potential problems, as well as the community's perceptions and attitudes about police practices and procedures. The executive should use complaints from the public as one means of determining whether the agency is falling short of its intended goals.

Accepting Reports Alleging Officer Misconduct

All complaints of officer misconduct shall be accepted from all persons who wish to file a complaint regardless of the hour or day of the week. This includes reports from anonymous sources, juveniles and persons under arrest or in custody. Internal affairs personnel, if available, should accept complaints. If internal affairs personnel are not available, supervisory personnel should accept reports of officer misconduct, and if no supervisory personnel are available, complaints should be accepted by any law enforcement officer. At no time should a complainant be told to return at a later time to file his report.

Citizens should be encouraged to submit their complaints as soon after the incident as possible. If the citizen cannot personally appear at the agency to file the complaint, a member of the agency, preferably a member of the internal affairs unit, should visit the citizen at his or her home, place of business or other location if necessary to complete the report. Under no circumstances shall it be necessary for a citizen to make a sworn statement to initiate the internal affairs process. Furthermore, every police agency shall accept and investigate anonymous complaints.

The internal affairs investigator, supervisor or other officer receiving the complaint will explain the department's disciplinary procedures to the person making the complaint. The officer should advise the complainant that he or she will be kept informed of the status of the complaint and its ultimate disposition. To best accomplish this, the department shall prepare a fact sheet or brochure that includes information on the agency's internal affairs process and what role the complainant can expect to play. If feasible, the fact sheet or brochure should be provided to the complainant at the time the complaint is made. A sample fact sheet may be found in Appendix B.

The supervisor or other officer receiving the complaint shall complete the appropriate

internal affairs report form. The report form should have adequate instructions for proper completion.

Upon receipt of an internal affairs complaint, the internal affairs investigator can advise the complainant of the importance of providing accurate and truthful information. However, when making such an advisement, internal affairs investigators must remember that it is important to balance the need for receiving citizen complaints of officer misconduct against the danger of discouraging citizens from coming forward with their complaints. Therefore, any language that would serve to dissuade or intimidate a citizen from coming forward should be avoided. Nonetheless, citizens may be advised of the consequences of filing a false report.

Although there are complaints against officers that are legitimate and based upon facts, there are others that are contrived and maliciously pursued, often with the intent to mitigate or neutralize legal action taken against the complainant by an officer. The law enforcement agency must fully and impartially investigate the former, while taking a strong stand to minimize the latter. The law enforcement agency should notify the county prosecutor in any case where a complainant has fabricated or intentionally misrepresented material facts to initiate a complaint of officer misconduct.

Anonymous reports of improper conduct by an officer shall be accepted. All efforts will be made to encourage full cooperation by the complainant. The investigation of anonymous complaints can be troublesome. However, accurate information about officer wrongdoing may be provided by someone who, for any number of reasons, does not want to be identified. Therefore, an anonymous report must be accepted and investigated as fully as possible. In the event an agency receives an anonymous complaint, the officer accepting the complaint should complete as much of the internal affairs report form as he can given the information he has received.

Complaint against a law enforcement executive may originate from a member of the public or from an employee of the agency. All such complaints shall be documented and referred to the county prosecutor for investigation.

Complaints may also be received from other law enforcement agencies, such as neighboring municipal police agencies, the county prosecutors, the Division of Criminal Justice or federal law enforcement agencies. In such cases, the complaint should be forwarded to internal affairs for immediate investigation.

If a person comes to a particular law enforcement agency to make a complaint about a member of another law enforcement agency, he or she should be referred to that agency. If the complainant expresses fear or concerns about making the complaint directly, he should be referred to the county prosecutor.

All complaints should be investigated, as long as the complaint contains sufficient factual information to warrant an investigation. In cases where the identity of the officer is unknown, the internal affairs investigator should use all available means to determine proper identification. Where civil litigation has been filed and the complainant is a party to the litigation or a principal witness in the litigation, the internal affairs investigator shall consult with legal counsel to

determine whether an investigation is appropriate or warranted.

In some cases, a complaint is based on a misunderstanding of accepted law enforcement practices or the duties of the officer. Supervisors should be authorized to informally resolve minor complaints, whenever possible, at the time the report is made. If the complainant is not satisfied with such a resolution, the complaint should be forwarded to internal affairs for further action as warranted. The process of informally resolving internal affairs complaints requires the exercise of discretion by supervisors. The proper exercise of discretion in such matters cannot be codified.

Even if the citizen is satisfied with the informal resolution, the process should be recorded on an internal affairs report form. Regardless of the means of resolution, the integrity of the internal affairs process, particularly the receipt of citizen complaints, demands that all citizen complaints and inquiries be uniformly documented for future reference and tracking. The form should indicate that the matter was resolved to the satisfaction of the citizen and sent to internal affairs for review and filing. The internal affairs supervisor should periodically audit those reports indicating that a citizen's complaint was informally resolved to ensure that the agency's supervisors are properly implementing their authority to resolve citizen complaints.

Requirement 3

The agency must notify an officer in writing that a complaint has been made against him, and that an investigation will begin, unless this notification would interfere with the investigation.

Once a complaint has been received, the officer who is the subject of the complaint shall be notified in writing that a report has been made and that an investigation will commence. This notification is not necessary if it would impede the conduct of the investigation. An example of a notification form is found in Appendix F.

Immediate Suspension Pending Investigation and Disposition

In certain serious cases of officer misconduct, the agency may need to suspend the subject officer pending the outcome of the investigation and subsequent administrative or criminal charges. In order to effect an immediate suspension pending the investigation, at least one of the following conditions must be met:

1. The employee is unfit for duty.
2. The employee is a hazard to any person if permitted to remain on the job.
3. An immediate suspension is necessary to maintain safety, health, order or effective direction of public services.
4. The employee has been formally charged with a first, second or third degree crime.
5. The employee has been formally charged with a first, second, third or fourth degree crime or a disorderly persons offense while on-duty, or the act touches upon his or her employment.

Before the immediate suspension of an officer, the law enforcement executive or authorized person should determine which of those criteria apply. The decision whether or not to continue to pay an officer who has been suspended pending the outcome of the investigation rests with the law enforcement executive and appropriate authority, who should carefully consider all of the ramifications of these choices.

It should be clear that the suspension of an officer before the completion of an investigation or the disposition of a case is a serious matter. Such suspensions may be immediately necessary, as in the case of an officer reporting for work under the influence of alcohol. In other cases, however, a suspension need not be immediate but rather would follow a preliminary investigation into the matter which indicates that one of the above criteria has been met. In any case, suspension prior to the disposition of the case must be clearly documented and justified. At the time of the suspension, the individual shall be provided with a written statement of the reasons the action has been taken. In the event of a refusal by the individual to accept that written statement, a copy shall be provided to the individual's collective bargaining representative as soon as possible. If the immediate suspension is imposed by a supervisor or commander authorized to do so, the law enforcement executive must be advised without delay. He will then determine the status of the suspension given the facts of the case in light of the above criteria. In no case shall an immediate suspension be used as a punitive measure.

Investigation of Internal Complaints

Requirement 4

All allegations of officer misconduct shall be thoroughly and objectively investigated to their logical conclusion.

Time Limitations

Under *N.J.S.A.40A:14-147*, disciplinary charges alleging a violation of the agency's rules and regulations must be filed within 45 days of the date the person filing the charge obtained sufficient information to file the charge. This "45 day rule" does not apply to disciplinary charges alleging officer misconduct or incapacity. In addition, citizens are not required to make their complaint within 45 days of the incident. However, once the agency has received the citizen's complaint, the 45 day rule applies.

The commencement of a criminal investigation into the subject matter of an internal affairs complaint will cause the 45 day rule to be suspended pending the outcome of the criminal investigation. The 45 day rule will remain suspended until the disposition of the criminal investigation. However, upon disposition of the criminal investigation, agencies will once again be bound by the 45 day rule. Therefore, in the event a county prosecutor has initiated a criminal investigation of an internal affairs matter, the internal affairs unit must remain in contact with the county prosecutor on a regular basis to determine the progress of the investigation. Where a county prosecutor has decided to terminate a criminal investigation and return the matter to the agency for appropriate disciplinary action, the internal affairs investigator must be able to document the date on which he learned that the criminal investigation was closed by the county prosecutor and returned to the agency.

Where an agency can conduct an internal affairs investigation and file disciplinary charges within 45 days of the receipt of a complaint, the 45 day rule does not become an issue. However, if an agency cannot conduct an investigation or file disciplinary charges within 45 days of the receipt of the complaint, the burden is on the investigator and ultimately the agency to identify the point at which "sufficient information" was developed to initiate disciplinary action. Therefore, it is important that a detailed chronology be maintained of each investigation so that critical actions and decisions are documented.

Along these same lines, it is important that there is no delay between the conclusion of the investigation by the assigned investigator, and the decision to file charges by the person who has that responsibility. Although the 45 day clock begins at the time the person who has the responsibility to file charges has sufficient information, an agency would have a difficult time justifying an extensive bureaucratic delay once *any* member of that agency has established sufficient information. The need to eliminate bureaucratic delay is one of the reasons that the internal affairs unit should be closely aligned with the office of the law enforcement executive in the agency's organizational structure.

Agencies operating under the purview of Title 11A must comply with New Jersey Civil Service Commission Rules.⁴ Appendix N contains the time table used by the Civil Service Commission for disciplinary action. While these steps are mandatory for all Civil Service Commission agencies, the time table provides a model that should be adopted by all law enforcement agencies.

Investigation and Adjudication of Minor Complaints

Following the principle that the primary goal of internal affairs and discipline is to correct problems and improve performance, relatively minor complaints should be handled by management in the subject officer's chain of command. Complaints of demeanor and minor rule infractions should be forwarded to the supervisor of the subject officer's unit. It is often difficult for an immediate supervisor to objectively investigate a subordinate. In addition, that arrangement might obscure the possibility that part of the inappropriate conduct was the result of poor supervision. While the structure of each law enforcement agency is different, it is recommended that minor complaints be assigned to and handled by a commanding officer at least one step removed from the officer's immediate supervisor.

Supervisors conducting the investigation of minor complaints of inappropriate behavior must strive to conduct a thorough and objective investigation without violating the rights of the subject officer or any other law enforcement officer. Accordingly, all officers who may be called upon to do an internal investigation must be thoroughly familiar with the department's entire internal affairs policy, including the protection of the subject officer's rights and the procedures for properly investigating internal complaints.

The investigator should interview the complainant, all witnesses and the subject officer, as well as review relevant reports and documents, gather evidence, and conduct any other investigation as appropriate. The investigator should then submit a report to the law enforcement executive or appropriate supervisor summarizing the matter and indicating the appropriate disposition. Possible dispositions include:

1. Exonerated: The alleged incident did occur, but the actions of the officer were justified, legal and proper.
2. Sustained: The investigation disclosed sufficient evidence to prove the allegation, and the actions of the officer violated a provision of the agency's rules and regulations or procedures.
3. Not Sustained: The investigation failed to disclose sufficient evidence to clearly prove or disprove the allegation.
4. Unfounded: The alleged incident did not occur.

If the investigator determines that the complaint is unfounded, exonerated or not

⁴ N.J.A.C. 4A:1-1.1 *et seq.*

sustained, the investigation report is to be forwarded to internal affairs for review and entry in the index file and filing. The subject officer shall be notified in writing of the outcome of the investigation.

If the complaint is sustained, the superior officer so authorized should determine the appropriate disciplinary action. Typical disciplinary actions for minor infractions include performance notices, oral reprimands or written reprimands. The superior officer shall complete the appropriate disciplinary document, and provide a copy of that document to the officer being disciplined. A copy of the disciplinary document shall be forwarded to the law enforcement executive or appropriate supervisor for review, placed in the officer's personnel file, and sent to internal affairs for entry into the index file and filing.

Each agency should establish its own protocol for reviewing and purging performance notices and oral reprimands from an employee's personnel file. Written reprimands should remain permanently in the employee's personnel file.

Requirement 5

The agency must notify officers of complaints and their outcomes, and must notify complainants of the outcome of the investigation.

A letter should be sent to the complainant explaining the outcome of the investigation. If the allegation was unfounded or the officer was exonerated, this conclusion should be stated and defined for the civilian complainant. If the allegation was not sustained, the letter should provide the complainant with a brief explanation why the complaint was not sustained (e.g. insufficient proof, lack of witnesses, etc.). If the allegation was sustained and discipline was imposed, the letter should simply state that the allegation was sustained and that the officer was been disciplined according to department procedures. It is not necessary to specify the discipline imposed. Sample letters may be found in Appendix K.

Investigation and Adjudication of Serious Complaints

Requirement 6

Where preliminary investigation indicates the possibility of a criminal act on the part of the subject officer, the county prosecutor must be notified. Where the investigation involves the use of force by the officer which results in serious bodily injury or death, the county prosecutor must be notified immediately. In either case, no further action should be taken, including the filing of charges against the officer, until directed by the county prosecutor.

All serious complaints shall be forwarded to the internal affairs unit. This includes complaints of criminal activity, excessive force, improper or unjust arrest, improper entry, improper or unjustified search, differential treatment, serious rule infractions, and repeated minor rule infractions.

The county prosecutor must be notified of all allegations of criminal conduct within seven days of the receipt of the complaint by the internal affairs unit. The internal affairs investigator shall refrain from taking any further investigative action until directed to do so by the county prosecutor unless there is an imminent threat to the safety or welfare of an individual. Once a complaint has been forwarded to the prosecutor's office, that office shall endeavor to review the allegation within thirty days and advise the law enforcement agency whether a criminal investigation will be conducted. In the event the prosecutor's office cannot reach a decision within the initial thirty day period, the deadline may be extended in thirty day increments at the discretion of the county prosecutor. The law enforcement agency shall be advised of any extensions of the deadline.

If a criminal investigation is initiated, the law enforcement agency shall receive periodic and timely updates concerning the course of the investigation. While a criminal investigation is pending, complainants and witnesses may be referred by the law enforcement agency to the county victim witness office for information concerning the criminal investigation. Once the criminal investigation is complete and a disposition of the allegation has been made, the prosecutor's office shall provide the law enforcement agency with its investigative file for use in the internal affairs investigation subject to applicable State statutes, court rules and case law. If the prosecutor's office declines to initiate a criminal investigation or the investigation is administratively closed, the law enforcement agency shall be advised of the outcome in writing.

With respect to administrative complaints, the internal affairs supervisor or law enforcement executive will direct that an appropriate investigation be conducted by an internal affairs investigator. Investigators must strive to conduct a thorough and objective investigation without violating the rights of the subject officer or any other law enforcement officer. Internal affairs investigators, and anyone who may be called upon to do an internal investigation, must be thoroughly familiar with the department's entire internal affairs policy, including the protection of the subject officer's rights and the procedures for properly investigating internal complaints.

Internal affairs shall notify the suspect officer in writing that an internal investigation has been started, unless the nature of the investigation requires secrecy. The internal affairs investigator should interview the complainant, all witnesses and the subject officer, as well as review relevant reports and documents, and obtain necessary information and materials.

An administrative investigation may commence with the disposition of a complaint against the subject officer by the Superior Court or a municipal court. In the alternative, an administrative investigation may commence with a decision by a county prosecutor or a municipal prosecutor to dismiss a complaint against a subject officer. A finding of guilt by the Superior Court or a municipal court may assist in the resolution of an administrative investigation because a finding of guilt in those courts requires proof beyond a reasonable doubt which is more than is required to meet the burden of proof in administrative matters.

In the alternative, a disposition which does not involve a finding of guilt by the courts or where a complaint is dismissed by a county or municipal prosecutor means that there is an absence of proof beyond a reasonable doubt. However, it does not mean that an administrative investigation cannot be pursued or must be closed. The absence of proof beyond a reasonable doubt does not foreclose the possibility that an investigation may reveal evidence that meets the

burden of proof in administrative matters. Thus, the internal investigator must continue the administrative investigation to determine whether evidence can be developed that meets the burden of proof in administrative proceedings, namely a preponderance of the evidence.

Upon completion of the investigation, the internal affairs investigator will recommend dispositions for each allegation through the chain of command to the law enforcement executive. As previously described, these dispositions may include exonerated, sustained, not sustained, or unfounded. Each level of review may provide written recommendations and comment for consideration by the law enforcement executive.

The law enforcement executive, upon reviewing the report, supporting documentation and information gathered during any supplemental investigation, shall direct whatever action is deemed appropriate. If the complaint is unfounded or not sustained, or the subject officer is exonerated, the disposition shall be entered in the index file and the report filed.

If the complaint is sustained and it is determined that formal charges should be made, the law enforcement executive will direct either internal affairs or the appropriate commanding officer to prepare, sign, and serve charges upon the subject officer or employee. The individual assigned shall prepare the formal notice of charges and hearing on the charging form. This form will also be served upon the officer charged in accordance with *N.J.S.A. 40A:14-147*. An example of a charging form is provided at Appendix O.

The notice of charges and hearing shall direct that the subject officer may: 1) enter a plea of guilty to the charges; 2) enter a plea of not guilty to the charges; or 3) waive his or her right to a hearing. If the officer enters a plea of guilty or waives his or her right to a hearing, the law enforcement executive shall permit the officer to present mitigating factors prior to assessing a penalty. Conclusions of fact and the penalty imposed will be noted in the officer's personnel file after he has been given an opportunity to read and sign it. Internal affairs will cause the penalty to be carried out and complete all required forms.

If the subject officer enters a plea of not guilty and requests a hearing, the law enforcement executive will set the date for the hearing as provided by statute and arrange for the hearing of the charges. Internal affairs may assist the assigned supervisor or prosecutor in the preparation of the department's prosecution of the charges. This includes proper notification of all witnesses and preparing all documentary and physical evidence for presentation at the hearing.

The hearing shall be held before the designated hearing officer. The hearing officer shall recommend a disposition of the charges including modifying the charges in any manner deemed appropriate. The decision of the hearing officer must be in writing and should be accompanied by findings of fact for each issue in the case.

If the hearing officer finds the complaint against the officer is sustained by a preponderance of the evidence, he should recommend any of the penalties which he deems appropriate under the circumstances within the limitations of statute and the department's disciplinary system.

A copy of the decision and accompanying findings and conclusions shall be delivered to the officer or employee who was the subject of the hearing and to the law enforcement executive (if he was not the hearing officer) for the imposition of discipline. Upon completion of the hearing, internal affairs will complete all required forms (Civil Service Commission jurisdictions use the Final Notice of Disciplinary Action form DPF-31B) including the entry of the disposition in the index file. If the charges were sustained internal affairs will cause the penalty to be carried out. Documentation of the charge and the discipline shall be permanently placed in the officer's or employee's personnel file.

Upon final disposition of the complaint, in cases where the officer was not notified of the outcome through some written form of discipline, the officer shall be notified of the outcome of the case through a written internal department communication.

In all cases, a letter should be sent to the complainant explaining the outcome of the investigation. If the allegation was unfounded or the officer was exonerated, this conclusion should be stated and defined for the civilian complainant. If the allegation was not sustained, the letter should provide the complainant with a brief explanation why the complaint was not sustained (e.g. insufficient proof, lack of witnesses, etc.). If the allegation was sustained and discipline was imposed, the letter should simply state that the allegation was sustained and that the officer was been disciplined according to department procedures. It is not necessary to specify the discipline imposed.

Domestic Violence Incidents Involving Agency Personnel

Law enforcement personnel may become involved in domestic violence incidents. It is important to the integrity of the agency, the safety of the victim, and the career of the officer that such matters are handled appropriately. Thus, it is imperative that every law enforcement agency establish a policy for investigating and resolving complaints of domestic violence involving its employees. A sample policy may be found in Appendix S.

Whenever an officer is involved in a domestic violence incident, either as an alleged perpetrator or as a victim, internal affairs must be promptly notified. In cases where the officer was the alleged perpetrator, the officer's service weapon or any other weapon the officer may possess must be seized by the investigating officers as mandated by Attorney General Directives 2000-3 and 2000-4. The directives are set forth in Appendix T.

Every law enforcement agency should promulgate a rule which requires any officer or employee to notify the agency if he or she has been charged with an offense, received a motor vehicle summons, or been involved in a domestic violence incident. In cases of domestic violence, the investigating agency should also notify the employing agency's internal affairs investigators as soon as possible.

The primary responsibility for the investigation of the domestic violence incident itself, along with any related offenses, belongs to the agency which has jurisdiction over the incident. The processing of domestic violence complaints, restraining orders, criminal complaints, etc., will remain with that agency. In many cases, this will not be the officer's employing agency.

The employing agency's internal affairs officers will be responsible for receiving the information and documenting the matter as they would any other allegation of misconduct. If the report is that the officer is the victim of domestic violence, it should still be recorded and followed up in case employee assistance is warranted.

If a criminal charge has been filed, internal affairs must notify the county prosecutor immediately even if the incident took place in another county. As the chief law enforcement officer of the county, it is critical that a prosecutor be made aware of any outstanding criminal charges against any law enforcement officer in his or her county.

Internal affairs is responsible to review the investigation of the incident, and to conduct whatever further investigation is necessary, to determine if the officer violated department rules and regulations or if the officer's fitness for duty is in question. In addition, internal affairs will track the proceedings of any criminal charges or civil matters which may have arisen out of the incident. Internal affairs will also work with the county prosecutor to determine if and when an officer may have his weapon(s) returned.

Internal Affairs Investigation Procedures

Only after a thorough and impartial investigation can an informed decision be made as to the proper disposition of the complaint. Decisions based upon such an investigation will support the credibility of the department among its ranks as well as the public at large.

As with all other investigations, lawful procedures must be used to gather all evidence pertaining to allegations against a law enforcement officer. Investigations for internal disciplinary or administrative purposes involve fewer legal restrictions than criminal investigations. Restrictions that do exist, however, must be recognized and followed. Failure to do so may result in improperly gathered evidence being deemed inadmissible in court. Restrictions which apply to internal affairs investigations may have their basis in State statutes, case law, collective bargaining agreements, local ordinances, Civil Service Commission rules or agency rules and regulations. Internal affairs investigators shall familiarize themselves with all of the above provisions.

Complaints must be professionally, objectively and expeditiously investigated in order to gather all information necessary to arrive at a proper disposition. It is important to document citizens' concerns, even those which might appear to be unfounded or frivolous. If such complaints are not documented or handled appropriately, citizen dissatisfaction will grow, fostering a general impression of insensitivity by the agency to concerns of the community.

The internal affairs investigator may use any lawful investigative techniques including inspecting public records, questioning witnesses, interviewing the subject officer, questioning agency employees, and surveillance. Therefore, the investigator must understand the use and limitations of such techniques.

It is generally recommended that the complainant and other lay witnesses be interviewed prior to interviewing sworn members of the agency. This will often eliminate the need for having to do repeated interviews with agency members. However, this procedure does not have to be strictly adhered to if circumstances and the nature of the investigation dictate otherwise.

Interviewing the Complainant and Civilian Witnesses

The investigator assigned an internal investigations case should initially outline the case to determine the best investigative approach and identify those interviews immediately necessary. The investigator should determine if any pending court action or ongoing criminal investigation might delay or impact upon the case at hand. If it appears that the conduct under investigation may have violated the law, or the investigation involves the use of force by the officer which resulted in serious bodily injury or death, the county prosecutor shall be immediately notified of the internal affairs investigation.

If the investigation involves a criminal charge against the complainant, an initial interview should be conducted with the complainant. However, the investigator must realize that the complainant is simultaneously a criminal defendant arising out of the same incident, and must

be accorded all of the appropriate protections. Thus, all further contact with the complainant should be arranged with and coordinated through the county prosecutor and the complainant's defense attorney.

The complainant should be personally interviewed if circumstances permit. If the complainant cannot travel to the investigator's office, the investigator should conduct the interview at the complainant's home or place of employment if feasible. If not, an interview by telephone may be conducted. All relevant identifying information concerning the complainant should be recorded, e.g., name, complete address, telephone number and area code, race or ethnic identity, sex, date of birth, hair color, eye color, social security number, and place of employment (name and address).

All relevant facts known to the complainant should be obtained during the interview. An effort should be made to obtain a formal statement from the complainant at the initial interview.

Whenever possible, all witnesses to the matter under investigation should be personally interviewed and formal statements taken.

Reports, Records and Other Documents

All relevant reports should be obtained and preserved as expeditiously as possible. Internal department reports relating to a subject officer's duties should be examined. Examples of such reports include arrest reports and investigation reports, radio logs, patrol logs, vehicle logs and evidence logs pertaining to or completed by the officer.

The investigator should also examine and retrieve all electronic, computer, digital and video records. These may include analog and digital records created by radio and telephone recorders, computer aided dispatch systems, mobile data terminals, in-car video systems, video surveillance systems and other forms of audio and video recording. In these cases, the relevant data should be copied to an appropriate medium as soon as possible and retained by internal affairs.

Records and documents of any other individual or entity that could prove helpful in the investigation should be examined. These may include reports from other law enforcement agencies, hospital records, doctors' reports, jail records, court transcripts, FBI or SBI records, motor vehicle abstracts and telephone and cellular phone records. In some instances, a subpoena, search warrant or communications data warrant may be necessary to obtain the information.

Physical Evidence

Investigators should obtain all relevant physical evidence. All evidence, such as fingerprints, clothing, hair or fabric fibers, bodily fluids, stains and weapons should be handled according to established evidence procedures.

With respect to radio and telephone recordings, the original recording is the best evidence and should be secured at the outset of the investigation. Transcripts or copies of the original recordings can be used as investigative leads. Entire tapes or transmissions should be reviewed to reveal the totality of the circumstances.

Photographs

Photographs and video recordings can be useful tools if relevant to the investigation. In the event of a complaint involving excessive use of force, photographs of the complainant and the officer should be taken as close as possible to the time of the incident. In addition, photographs can be used to create a record of any other matter the investigator believes is necessary. Whenever possible, digital color photography should be used.

The law enforcement agency should maintain a recent photograph of each officer. These photographs can be used in the event a photo array is needed for identification purposes. If a photo array is used, it must be properly retained for possible evidentiary purposes.

Physical Tests

Police officers who are the subjects of internal investigations may be compelled to submit to various physical tests or procedures to gather evidence.

Evidence Rule 503 (a) states that “..no person has the privilege to refuse to submit to examination for the purpose of discovering or recording his corporal features and other identifying characteristics or his physical or mental condition..” Evidence that may be obtained or procedures that may be used to obtain evidence under this rule include:

1. Breath sample
2. Blood sample
3. Buccal swab
4. Requiring suspect to speak
5. Voice recordings
6. Participation in a lineup
7. Handwriting samples
8. Hair and saliva samples
9. Urine specimens
10. Video taping
11. Field sobriety tests

For internal affairs investigations that may result in a criminal prosecution, physical tests should be conducted pursuant to a court order or an investigative detention under Court Rule 3:5A. Officers that refuse to perform or participate in a court ordered physical test may be subject to a contempt of court sanction as well as agency discipline for failing to comply with the court order.

For internal affairs investigations that may result in an administrative disciplinary proceeding, subject officers may be ordered by the internal affairs investigator or the appropriate supervisor to perform or participate in a physical test. The order must be reasonable and relevant to the investigation at hand. Officers that refuse to perform or participate in a lawfully ordered physical test can be disciplined for their refusal to do so.

Drug Testing

The testing of law enforcement officers in New Jersey for the illegal use of drugs is strictly regulated by the *Attorney General's Law Enforcement Drug Testing Policy*. This policy permits the testing of applicants and trainees for law enforcement positions. It further specifies that veteran law enforcement officers may only be tested for drugs if reasonable suspicion exists that they are using such drugs, or if they have been chosen as part of a regulated random drug testing program. In any case, drug testing is done through an analysis of urine samples by the State Toxicology Laboratory.

The *Attorney General's Law Enforcement Drug Testing Policy* identifies specific responsibilities that may be assigned to internal affairs. These include the collection of specimens, the establishment of a chain of custody and the maintenance of drug testing records. Every officer assigned to internal affairs should be familiar with the *Attorney General's Law Enforcement Drug Testing Policy*.

Polygraph

N.J.S.A. 2C:40A-1 states that an employer shall not influence, request or require an employee to take or submit to a lie detector test as a condition of employment or continued employment. To do so constitutes a disorderly persons offense. Therefore, a law enforcement officer should never be asked to take a polygraph examination as part of an internal affairs investigation. It should not even be suggested to the officer by the investigator that a polygraph examination would be appropriate, that it "might clear this whole thing up." However, the subject officer may voluntarily request to take a polygraph examination.

Polygraph tests of civilian complainants and witnesses should only be used when there is a reasonable suspicion that their statements are false. Polygraph examinations should not be used routinely in internal affairs investigations. Under no circumstances should polygraph examinations be used to discourage or dissuade citizen complainants. In addition, a victim of sexual assault cannot be asked or required to submit to a polygraph examination as a condition for proceeding with the investigation. *Attorney General Law Enforcement Directive No. 2009-1*.

Search and Seizure

All citizens, including police officers, have a Fourth Amendment right to be free from unreasonable searches and seizures. In an internal affairs investigation, the Fourth Amendment applies to any search undertaken by the employing agency. The internal affairs investigator must be cognizant of the various principles governing search and seizure particularly where the investigator will conduct a search as part of a criminal investigation or the investigator will search personal property belonging to the subject officer.

Criminal investigations generally require the investigator to obtain a search warrant in order to conduct a search. Search warrants require probable cause to believe that the search will reveal evidence of a crime. In internal affairs investigations, a search warrant should be obtained before a search is conducted of a subject officer's personal property including his or her home, personal car, bank accounts, safety deposit boxes, briefcases etc. In addition, a warrant may be necessary where a search of the subject officer's workplace is conducted and it is determined that the officer has a high expectation of privacy in the place to be searched. The internal affairs investigator should consult with the county prosecutor's office before undertaking the search of any workplace area in a criminal investigation.

The law is somewhat less restrictive with respect to searches conducted during an administrative investigation. While it appears that an employing agency does not need a warrant to conduct a search during an administrative investigation, great care should be exercised by the investigator when searching property or items in which the subject officer has a high expectation of privacy. Internal affairs investigators should document their reasons for conducting the search and limit the intrusiveness of the search itself. If there are any doubts or concerns about the propriety or legality of a search, the investigator should seek advice from legal counsel before proceeding with the search.

Generally, during either administrative investigations or criminal investigations, workplace areas may be searched without a search warrant. The critical question is whether the public employee has a reasonable expectation of privacy in the area or property the investigator wants to search. The determination of a reasonable expectation of privacy must be decided on a case by case basis. There are some areas in the person's workplace where this privacy expectation can exist just as there are some areas where no such expectation exists. Areas that several employees share, or where numerous employees go to utilize files or equipment, would present no expectation or a diminished expectation of privacy. Included here would be squad rooms, lobby areas, dispatch areas, government provided vehicles (patrol cars), general filing cabinets, etc.

However, employees may have a greater expectation of privacy in their own lockers or assigned desks, or possibly in a vehicle assigned to them solely for their use. If a department intends to retain the right to search property which it assigns to officers for their use, including lockers and desks, it should put officers on notice of that fact. This notification will help defeat an assertion of an expectation of privacy in the assigned property by the officer. The agency should issue a directive regarding this matter, as well as provide notice of the policy in any employee handbook or personnel manual (including the rules and regulations) provided by the agency. Notice should also be posted in the locker area and on any bulletin boards. The

following is a sample of what such a notice should contain:

The department may assign to its members and employees departmentally owned vehicles, lockers, desks, cabinets, etc., for the mutual convenience of the department and its personnel. Such equipment is and remains the property of the department. Personnel are reminded that storage of personal items in this property is at the employee's own risk. This property is subject to entry and inspection without notice.

In addition, if the department permits officers to use personally owned locks on assigned lockers and other property, it should be conditioned on the officer providing the department with a duplicate key or the lock combination, whichever is applicable.

With the introduction of new technologies in law enforcement, it may become necessary to search computers and seize their contents. As before, the critical question is whether the public employee has a reasonable expectation of privacy to information stored in a computer. While the determination of a reasonable expectation of privacy must be decided on a case by case basis, the law enforcement agency should take steps to actively and affirmatively diminish this expectation. The agency should state, in writing, that it retains the right to enter and review the contents of any department issued computer at any time. This notice may be worded as follows:

The department may assign to its members and employees departmentally owned computers for business purposes. Such computer equipment and its contents are and remain the property of the department. Personnel are prohibited from installing unauthorized software and from storing personal information in the computer, regardless of any password protection or encryption. The computers, their contents, and any email or electronic correspondence originating from or arriving at the department computer are the property of the department and are subject to entry and inspection without notice.

The courts routinely examine agency practice in evaluating the expectation of privacy. Thus, written notification would quickly be nullified if representatives of the agency in fact never did enter or inspect any of these areas. Therefore, in addition to notifying employees of the department's right to search and inspect, the agency should with some regularity inspect these areas to establish the practice to coincide with the policy. Any search of departmental or personal property should be conducted in the presence of the subject officer and a property control officer.

A voluntary consent to a search may preclude some Fourth Amendment problems from developing. A consent search eliminates the need to determine what threshold standard must be met before conducting the search or seizure, either for an administrative or criminal investigation. Under New Jersey law, for consent to be legally valid, a person must be informed that he or she has the right to refuse to permit a search.⁵ If a consent search is undertaken, the

⁵ *State v. Johnson*, 68 N.J. 349 (1975)

internal affairs investigator shall follow standard law enforcement procedures and have the subject officer sign a consent form after being advised of the right to refuse such a search.

Electronic Surveillance

N.J.S.A. 2A:156A-1 et seq. governs the use of electronic surveillance information in New Jersey. This statute specifically covers the areas of :

"Wire communication," which essentially means any conversation made over a telephone;

"Oral communication," which means any oral communication uttered by a person who has an expectation that such communication will be private; and

"Electronic communication," which means the transfer of communications and information over a computer or facsimile type device.

All of these forms of communication are protected from intrusion and interception except under very narrowly defined exceptions.

One such exception is when one person who is a part of a communication decides to intercept (e.g., record) the conversation. As long as this person is a part of the conversation, such recording is lawful. However, if the person stops being a party of the conversation (e.g., he or she walk away from the group, or he or she turn the telephone over to someone else), it is no longer lawful for him or her to intercept the conversation.

Another exception exists where a person, acting at the direction of an investigative or law enforcement officer, gives prior consent to intercept a wire, electronic or oral communication, and that "third party" person is one of the parties to the communication. This "consensual intercept" can only be made after the Attorney General or a county prosecutor or a designee approves such interception.

Pursuant to *N.J.S.A. 2A:156A-4b*, a law enforcement officer may intercept and record a wire or oral communication using a body transmitter if that officer is a party to the communication, or where another officer who is a party to the communication requests or requires that such interception be made. Procedures for such recordings are dictated by individual departmental or agency policy. This kind of law enforcement non-third party intercept can be used during internal affairs investigations.

Generally, the use of evidence derived from an authorized wiretap is limited to criminal investigations and prosecutions. Agencies that wish to use wiretap information in a disciplinary proceeding should consult with their county prosecutor. It may be necessary to obtain a court order to use wiretap information in a disciplinary matter.

The monitoring of 911 telephone lines is required by law. There is no prohibition against the monitoring of other telephones used exclusively for departmental business if the agency can demonstrate a regulatory scheme or a specific office practice of which employees have

knowledge. In such instances, there is a diminished expectation of privacy in the use of these telephones and monitoring would be acceptable.

The New Jersey Wiretap Act applies only to oral, wire and electronic communications. While not specifically covered by this law, however, there should be reasonable limitations on video surveillance. The primary issue is one of privacy. Video surveillance, especially covert surveillance, should not be used in areas where employees have a high expectation of privacy such as locker rooms and bathrooms. In public areas, video surveillance may be used. In many law enforcement agencies, certain areas have video surveillance for security reasons, such as lobbies, cell blocks and sally ports. Video obtained from these sources is applicable to internal investigations. Questions about the specific application of video surveillance, especially covert surveillance, should be addressed to the county prosecutor's office. It must be emphasized that this refers to video surveillance with no sound recording component.

Many law enforcement agencies are now using in-car video systems, which record the video image from a camera mounted in the car and an audio signal from a microphone worn by the officer. These recordings are available for use in internal investigations, since the video image is not restricted at all, and the officer is a party to the audio portion of the recording at all times.

Some agencies equip their patrol vehicles or other vehicles with global positioning devices. These devices permit the location of a vehicle to be fixed with great accuracy. Information gleaned from these devices may be used in internal affairs investigations because the subject officer has no expectation of privacy in his or her whereabouts during the performance of police duties.

Lineups

A law enforcement officer may be ordered to stand in a lineup to be viewed by witnesses or complainants. There is no need for probable cause and the officer may be disciplined for refusal.⁶

The lineup must be constructed so as not to be unfairly suggestive. The same rule applies to photo arrays.

Investigation of Firearms Discharges

All incidents involving non-training firearms discharges, whether occurring on or off duty, must be thoroughly investigated. Whenever a firearms discharge results in an injury or death the county prosecutor must be notified immediately. In addition, internal affairs personnel shall be notified immediately. Internal affairs personnel will proceed in the investigation as directed by the prosecutor. The internal affairs investigator should review all administrative reports required by the department. These reports should include a description of the incident; the

⁶ *Biehunik v. Felicetta*, 441 F.2d 228 (2d Cir. 1971) *cert. den.* 403 U.S. 932, 91 S.Ct. 2256, 29 L.Ed. 2d 711 (1971),

date, time, and location of the incident; the type of firearm used; the type of ammunition used and number of rounds fired; the identity of the officer; and any other information requested by a superior officer. The involved officer's supervisor should assist the internal affairs investigator as needed.

Agencies that have established a "Shooting Response Team" to investigate officer firearms discharge incidents should coordinate their investigations with the internal affairs unit.

Officers investigating firearms discharges must strive to conduct a thorough and objective investigation without violating the rights of the subject officer or any other law enforcement officer. Accordingly, all supervisors and any other officer who may be called upon to do a firearms discharge investigation must be thoroughly familiar with the department's entire internal affairs policy, including protection of the subject officer's rights and the procedures for properly investigating firearms discharges.

The investigator must consider relevant law, any Attorney General or county prosecutor policies and guidelines, and department rules and regulations, and policy. In addition to determining if the officer's actions were consistent with the department regulations and policy, the internal affairs investigator should also examine the relevance and sufficiency of these policies. The investigator should also consider any relevant aggravating or mitigating circumstances.

The investigation of a shooting by an officer should include photographs and ballistics tests as well as interviews with all witnesses, complainants, and the officer involved. All firearms should be treated as evidence according to departmental procedures. A complete description of the weapon, its make, model, caliber, and serial number must be obtained and, if appropriate, N.C.I.C. and S.C.I.C. record checks should be made.

In a firearms discharge investigation, the investigator must determine if the weapon was an approved weapon for that officer, and if the officer was authorized to possess and carry the weapon at the time of the discharge. The investigator must also determine if the weapon was loaded with authorized ammunition. The weapon must be examined for its general operating condition and to identify any unauthorized alterations made to it.

Collateral Issues

The work of an internal affairs unit should not be limited to resolving citizen reports by narrowly focusing on whether the subject officer engaged in misconduct. In many cases, the examination of collateral issues presented by the citizen's report can be as important as the resolution of the allegation itself. For example, while investigating an allegation of excessive force during an arrest, the actions of the officer in making the arrest in the first place may be improper. In such cases, even though the investigation may exonerate the officer of the excessive force allegation, internal affairs must still examine whether the officer should have been effecting the arrest at all.

The examination of collateral issues can provide the law enforcement agency and its executive officers with information concerning:

- the utility and effectiveness of the department's policies and procedures;
- the competency and skills of individual law enforcement officers;
- appropriate topics for in-service training programs; and
- the allocation of resources by the law enforcement agency and other municipal agencies

The identification and examination of collateral issues is of critical importance to the internal affairs process. Internal affairs investigators are in the unique position of examining law enforcement operations from the inside. Their insight, if properly used, can be extremely helpful to management. In contrast, the failure to use this resource can deprive the law enforcement agency of the ability to identify and correct problems with personnel and procedures through self-critical analysis. It can also lead to an erosion of support for the department in the community. An internal affairs process that is objective and complete is critical to the credibility and reputation of the law enforcement agency within the community.

Interviewing Members of the Department

General Background

The interview of a police officer as either the subject of an internal affairs investigation or as a witness to an incident that is the subject of an internal affairs investigation represents a critical stage in the investigative process. Often, the information gained during such an interview will go a long way toward resolving the matter regardless of the outcome.

The difficulty in conducting officer interviews, particularly subject officer interviews, is the differing legal principles that apply depending on the nature of the interview and the type of investigation being conducted. For example, a subject officer suspected of criminal conduct will be interviewed in a manner far different than an officer suspected of committing a disciplinary infraction. A further distinction may be made when the officer to be interviewed is believed to be a witness to either criminal conduct or an administrative infraction.

While a police officer has the same constitutional rights as any other citizen during a criminal investigation, their status as a police officer may create special concerns. For the most part, the internal affairs investigator should utilize the same procedures and apply the same legal principles to the subject officer as he or she would to any other target or suspect in a criminal investigation. However, the internal affairs investigator should recognize that the interview process of a police officer is somewhat different than the interview of any other citizen.

A police officer has the same duty and obligation to his or her employer as any other employee. Thus, where an internal affairs investigation is being conducted solely for purposes of initiating disciplinary action, the officer has a duty to cooperate during an administrative interview. In addition, the officer must truthfully answer all questions put to him or her during the course of the administrative investigation. An officer's failure to fully cooperate with an administrative investigation and/or an officer's failure to be completely truthful during an administrative interview can form the basis for disciplinary action separate and apart from the allegations under investigation.

For the internal affairs investigator, it is critical to distinguish between those investigations involving potential criminal conduct and those investigations limited to administrative disciplinary infractions. In addition, the investigator must be able to identify and apply the appropriate procedures to be utilized during the interview process in either a criminal investigation or an administrative investigation. The failure of an investigator to identify and apply the appropriate procedures can compromise and render inadmissible evidence gathered during the interview process in a criminal investigation or needlessly complicate the interview process during an administrative investigation.

The vast majority of internal affairs investigations will be limited to alleged disciplinary infractions and the vast majority of law enforcement officer interviews conducted during an internal affairs investigation will be limited to gathering evidence of disciplinary infractions. Nonetheless, in cases of a potential criminal violation, it is absolutely necessary for the internal affairs investigator to coordinate officer interviews with the county prosecutor's office.

Because the county prosecutor is ultimately responsible for the prosecution of criminal cases, the internal affairs investigator shall defer to the supervision and direction of the county prosecutor in conducting officer interviews. The investigator shall consult with the county prosecutor prior to the initiation of an officer interview in matters that could involve criminal conduct. The investigator shall pay particular attention to the county prosecutor's instructions concerning the type of interview to be conducted and types of procedures to be utilized (e.g. *Miranda* warning, *Garrity* warning, etc.).

Police officer interviews during an internal affairs investigation are rendered difficult by the conflict that exists between the officer's right against self-incrimination in criminal interviews and the officer's obligation to answer questions truthfully during an administrative investigation. In other words, while an agency may compel an officer to answer questions posed during the course of an administrative investigation, an officer cannot be forced to give answers that could be used against him or her in a criminal prosecution. Officers who have been compelled by order to produce incriminating information, with the belief that a failure to do so will result in disciplinary action, cannot have that evidence used against them in a criminal prosecution. However, an officer can be compelled to provide answers during an internal affairs investigation if those answers are to be used as evidence only in a disciplinary proceeding.

A subject officer who reasonably believes that what he or she might say during an internal affairs interview could be used against him or her in a criminal case cannot ordinarily be disciplined for exercising his or her *Miranda* rights. However, an officer can be disciplined for refusing to answer questions during an internal affairs interview if he or she has been told that whatever he or she says during the interview will not be used against the officer in a criminal case. The procedure by which an officer is informed that his or her statement will not be used against him or her in a criminal case is called a *Garrity* warning. Through this warning, the officer being interviewed is informed that he or she must cooperate with the investigation and can be disciplined for failing to do so because the county prosecutor has decided to provide the officer with "use immunity". Under this doctrine, the officer's statement cannot be introduced as evidence against him or her in a criminal case.

It is for this reason that the internal affairs investigator must continually reassess the nature of an internal affairs investigation as evidence is being gathered. Having initially determined that a particular allegation is criminal or administrative in nature, it is important for the internal affairs investigator to revisit that decision during the course of an investigation to determine whether any of the evidence gathered following the initial determination changes the nature and scope of the investigation. In the event the nature and scope of an investigation has changed, the investigator must be prepared to change the methods and procedures he or she was utilizing to reflect the new focus. For example, if an investigator initially determines that an allegation appears to be a disciplinary matter, but later evidence leads the investigator to conclude that criminal conduct may have occurred, the investigator must cease using the methods and procedures appropriate for an administrative investigation and notify the county prosecutor immediately before proceeding further.

In the sections that follow, the details of interviewing law enforcement officers in internal matters will be discussed. The chart in Figure 1 provides an overview of that information.

Figure 1.

	CRIMINAL Investigation	ADMINISTRATIVE Investigation
Officer is SUBJECT	<ul style="list-style-type: none"> • Prosecutor notification • Treat as any other defendant • <i>Miranda</i> warning • No <i>Garrity</i> warning unless prosecutor approves • May require routine business reports • No special reports • Right to counsel (attorney) 	<ul style="list-style-type: none"> • Obligation to cooperate • Administrative interview form • May require special reports • Cannot charge as a subterfuge • Right to representative
Officer is WITNESS	<ul style="list-style-type: none"> • Obligation to cooperate • No <i>Miranda</i> warning • Witness acknowledgment form • May be entitled to a Weingarten representative 	<ul style="list-style-type: none"> • Obligation to cooperate • Witness acknowledgment form • May be entitled to a Weingarten representative

Serious allegations of misconduct by a law enforcement officer may implicate both a violation of a criminal statute and a violation of an agency's rules and regulations. As a result, a criminal investigation and an administrative disciplinary investigation may be needed to properly resolve a misconduct complaint. In those cases where both a criminal investigation and an administrative disciplinary investigation are needed, the internal affairs investigator from the subject officer's agency is often expected to perform both investigations. Under these circumstances, the methods employed in the criminal investigation conflict with the methods used in the administrative investigation.

Typically, this conflict will become most apparent during subject officer interviews. As has already been pointed out, a subject officer has the right to remain silent during a criminal investigative interview. On the other hand, the same officer must cooperate and answer questions posed by his or her employer during an administrative disciplinary interview. Thus, while the internal affairs investigator cannot require a subject officer to answer questions during a criminal interview, the investigator can require a subject officer to answer questions during an administrative disciplinary interview.

The confusion caused by these issues can be alleviated several ways. One method is to separate the investigations by time - the criminal investigation is completed first, and then the administrative investigation may follow. Another method is the utilization of bifurcated investigations. In a bifurcated investigation, the responsibility for a criminal investigation is separated from the responsibility for an administrative investigation. Thus, one investigator (typically from the prosecutor's office) is assigned the responsibility of gathering evidence of criminal wrongdoing while a second investigator (typically the internal affairs investigator from the subject officer's agency) is assigned the responsibility of gathering evidence of a disciplinary

infraction.

With a bifurcated investigation, the internal affairs investigator will not be forced to juggle the roles of criminal investigator and administrative investigator during the course of an internal affairs investigation. This is particularly important during the subject officer interview for three reasons. First, the internal affairs investigator will not be forced to decide whether and when to issue a *Miranda* warning or a *Garrity* warning during the interview. In a bifurcated investigation, the criminal investigator will be limited to issuing a *Miranda* warning while the administrative investigator will be limited to issuing a *Garrity* warning. Second, by assigning distinct roles to each of the investigators, there will be no confusion on the part of the subject officer as to the purpose of an interview in which he or she is participating. Third, because a bifurcated investigation permits both the criminal and administrative investigations to take place simultaneously, the administrative investigator can be confident that once the criminal investigation has been completed, the administrative investigation will also be substantially complete. As a result, the subject officer's agency will have no difficulty complying with the 45 day rule under N.J.S.A. 40A:14-147.

Criminal Investigation, Officer Is Subject

Requirement 7

Whenever there is a possibility that the investigation may result in criminal prosecution of the officer or that the county prosecutor may be conducting a separate criminal investigation, the internal affairs investigator must consult with the county prosecutor prior to interviewing the officer.

Once an investigation becomes criminal in nature, the subject officer shall be advised of his or her right against self-incrimination consistent with the requirements of the law and this policy. Criminal interviews should be conducted only with the prior approval or at the direction of the county prosecutor.

Generally, the need to issue *Miranda* warnings is triggered whenever the questioning of an individual is custodial in nature. With respect to custodial interviews, the question is whether a reasonable person would believe that he or she is free to leave. Thus, a subject officer who is not free to leave a criminal interview should be provided a *Miranda* warning.

However, the internal affairs investigator should be aware that other factors may also serve to affect a subject officer's decision to answer questions during a criminal interview. For example, directing an officer to appear at a particular time and place may generate confusion on the part of the officer as to whether he or she is being required to participate in the interview. When these circumstances are present, the internal affairs investigator should consult with the county prosecutor regarding the advisability of informing the subject officer of his or her right against self-incrimination. Any questions regarding the need for or advisability of providing such a warning in criminal interviews should be directed to and resolved by the county prosecutor.

If the subject officer waives his rights, the interview may then continue. Unless the

officer specifically waives his Fifth Amendment rights, any incriminating statements obtained under direct order will not be admissible in a criminal prosecution. However, they will be admissible in an administrative hearing. The subject officer should be afforded the opportunity to consult with an attorney prior to an interview.

If the officer has invoked his or her *Miranda* rights, but the department deems that in order to properly conduct its investigation it must have the answers to specific questions, the department must contact the county prosecutor to request use immunity in order for the interview to continue. This contact should be made in such a time frame to allow the county prosecutor to review all relevant reports and to have a full briefing prior to determining whether to grant use immunity. Use immunity provides that anything the officer says under the grant of immunity, and any evidence derived from his or her statements, cannot be used against him or her in a criminal proceeding, except for perjury or false swearing if the information is not truthful. However, use immunity does not eliminate the possibility that the subject officer will be prosecuted. A criminal prosecution may proceed even though the target or defendant has received use immunity.

If the county prosecutor grants use immunity, the department shall advise the subject officer, in writing, that he or she has been granted use immunity in the event his or her answers implicate him or her in a criminal offense. The officer must then answer the questions specifically and narrowly related to the performance of his or her official duties, but no answer given, nor any evidence derived from the answer, may be used against this officer in a criminal proceeding. At this point, any officer refusing to answer is subject to disciplinary charges and possible dismissal from employment for that refusal.

A grant of use immunity shall be recorded in a form which the subject officer signs and which signature is witnessed. The completed form must be made a part of the investigative file. See the sample form in Appendix J. In all cases, approval from the authorizing assistant prosecutor or deputy attorney general must be obtained before giving the *Garrity* warning.

Criminal Investigation, Officer Is Witness

When interviewing a law enforcement officer as a witness, he or she must be made aware of the differences between being a witness in a criminal investigation and being the subject of a criminal investigation. In addition, the officer shall be advised that he or she is not the subject of the investigation at this time. Appendix G provides a model of a form which may be used to accomplish this. If, at any time, the officer becomes a subject of the investigation, he or she shall be advised of that fact and the appropriate procedures followed.

Officers who are witnesses have an obligation to cooperate. They must truthfully answer all questions that are narrowly and directly related to the performance of their duty. "Performance of duty" includes an officer's actions, observations, knowledge, and any other factual information of which they may be aware, whether it concerns their own performance of duty or that of other officers. If the officer feels his or her answer would incriminate him or her in a criminal matter, the officer must assert his or her *Miranda* rights.

Administrative Investigation, Officer Is Subject

A public employee has an obligation to answer questions specifically, directly, and narrowly related to the performance of his or her official duties, on pain of dismissal. This obligation exists even though the answers to the questions may implicate the employee in a violation of agency rules, regulations and procedures, which may ultimately result in some form of discipline up to and including dismissal. In short, in administrative investigations, there is no "right to remain silent."

However, internal affairs investigators in civil service jurisdictions should be aware that under civil service rules, an employee cannot be forced to testify at his or her own disciplinary hearing.⁷ Thus, as a matter of fairness, the internal affairs investigator in a civil service jurisdiction should refrain from questioning a subject officer with respect to a particular disciplinary offense if the officer has already been charged with the offense and is awaiting an administrative hearing on the charge.

Prior to the commencement of any questioning, the officer shall be advised that he or she is being questioned as the subject of an investigation into potential violations of department rules and regulations, or fitness for duty. He or she should be advised of the subject matter under investigation, and that he or she will be asked questions specifically related to the performance of his or her official duties.

This information shall be recorded on a form which the subject officer signs and which is witnessed. The completed form must be made a part of the investigative file. See the sample form in Appendix H. ***The form in Appendix H shall only be used for administrative, non-criminal investigations.***

If the officer refuses to answer questions during this interview, the interviewer should inquire about the reason for the refusal.

If the subject officer states that he refuses to answer any questions on the grounds that he may incriminate himself in a criminal matter, even though the investigators do not perceive a criminal violation, the department should discontinue the interview and contact the county prosecutor.

If the department wants to continue its administrative interview, and the county prosecutor agrees to grant use immunity, the department shall advise the subject officer, in writing, that he or she has been granted use immunity in the event his or her answers implicate him or her in a criminal offense. The officer must then answer the questions specifically related to the performance of his or her official duties, but no answer given by him or her, nor evidence derived from the answer, may be used against the officer in a criminal proceeding. At this point, if the officer refuses to answer, he or she is subject to disciplinary charges for that refusal which can result in dismissal from the agency. This information shall be contained in a form which the subject officer signs and which is witnessed. The completed form must be made a part of the

⁷ N.J.A.C. 4A:2-2.6(c)

investigative file. (See the sample form in Appendix J.)

If the subject officer refuses to answer on any other grounds, he or she should be advised that his or her refusal will subject him or her to disciplinary action, up to dismissal, in addition to discipline for the matter that caused the interview in the first place. If the officer still refuses, the interview should be terminated and appropriate disciplinary action initiated.

The courts have decided that a public employer must permit an employee to have a representative present at an investigative interview if the employee requests representation and the employee reasonably believes the interview may result in disciplinary action⁸. However, a representative shall be permitted to be present at the interview of a subject officer whenever he or she requests a representative. While the Sixth Amendment right to counsel does not extend to administrative investigations, an officer shall be permitted to choose an attorney as their representative if he or she so desires.

If it appears that the presence of counsel or another representative requested by the subject will not disrupt or delay the interview, there is no reason to prevent his or her presence as an observer.

Nonetheless, the representative or attorney cannot interfere with the interview. If the representative is disruptive or interferes, the investigator can discontinue the interview, documenting the reasons the interview was ended. The investigator must be in control of the interview and cannot allow the representative or subject to take control.

Administrative Investigation, Officer Is Witness

When interviewing a law enforcement officer as a witness, he or she must be made aware of the differences between being a witness in an administrative investigation and being the subject of an administrative investigation. In addition, the officer should be advised that he or she is not the subject of the investigation at this time. Appendix G provides a model of a form which may be used to accomplish this. If, at any time, the officer becomes a subject of the investigation, he should be advised of that fact and the appropriate procedures followed.

Officers who are witnesses have an obligation to cooperate. They must truthfully answer all questions that are narrowly and directly related to the performance of their duty. "Performance of duty" includes an officer's actions, observations, knowledge, and any other factual information of which they may be aware, whether it concerns their own performance of duty or that of other officers. If the officer feels his or her answer would incriminate him or her in a criminal matter, the officer must assert his or her *Miranda* rights.

⁸ *N.L.R.B. v. Weingarten*, 420 U.S. 251, 95 S.Ct. 959, 43 L.Ed. 2d 171 (1975).

Interviewing Procedures

Interviews should take place at the internal affairs office or a reasonable and appropriate location designated by the investigator. The subject officer's supervisor should be made aware of the time and place of the interview so the officer's whereabouts are known. Interviews shall be conducted at a reasonable hour when the officer is on duty, unless the seriousness of the matter requires otherwise.

The employee shall be informed of the name and rank of the interviewing investigator and all others present during the interview. The questioning session must be of reasonable duration, taking into consideration the complexity and gravity of the subject matter of the investigation. The officer must be allowed time for meal breaks and to attend to personal physical necessities.

In cases of potential criminal conduct, interviews of subject officers should be recorded consistent with Attorney General Directive 2006-2. A copy of the directive may be found in Appendix U. With respect to serious disciplinary infractions, the agency should make an audio or video recording of the interview, or should make a stenographic record. A transcript or copy of the recording shall be made available to the officer, if applicable, at the appropriate stage of a criminal or disciplinary proceeding. If the subject officer wishes to make a recording of the interview, he or she may do so, and a copy of the recording shall be made available to the department upon request, at the agency's expense. Agencies should consider adopting a policy requiring officers to inform the agency or the internal affairs investigator if the officer plans to record the interview.

Any questions asked of officers during an internal investigation must be "narrowly and directly" related to the performance of their duties and the ongoing investigation.⁹ Officers must answer questions directly and narrowly related to the performance of their duties. All answers must be complete and truthful. However, officers cannot be compelled to answer questions having nothing to do with their performance as law enforcement officers, questions that do not implicate a rule or regulation violation or questions unrelated to the investigation.

At the conclusion of the interview, the investigator should review with the subject officer all the information obtained during the interview, to alleviate any misunderstandings and to prevent any controversies during a later hearing or trial.

⁹ *Gardner v Broderick*, 393 U.S. 273 (1968)

Internal Affairs Records

The Internal Affairs Report

At the conclusion of the internal affairs investigation, the investigator shall submit a written report. This report should consist of an objective investigation report which recounts all of the facts of the case, and a summary of the case along with conclusions for each allegation and recommendations for further action.

Investigation Report

The first part of the report will be an objective recounting of all the relevant information disclosed during the investigation, including statements, documents, and other evidence. This part of the report is similar in all respects to a standard law enforcement investigation report. It should contain a complete account of the investigation.

Summary and Conclusions

The investigator should summarize the case and provides a conclusion of fact for each allegation. The conclusion of fact should be recorded as exonerated, sustained, not sustained, or unfounded.

If the conduct of an officer was found to be improper, the report must cite the agency rule, regulation, or S.O.P. which was violated. Also, any aggravating or mitigating circumstances surrounding the situation, such as unclear or poorly drafted agency policy, inadequate training or lack of proper supervision, shall be noted.

If the investigation reveals evidence of misconduct not based on the original complaint, this too must be reported. An investigation concerning this secondary misconduct should be conducted.

Internal Affairs Records

Requirement 8

The agency must establish and maintain an internal affairs records system consisting of, at least, an internal affairs index system and a filing system for all documents and records. Access to these records shall be restricted.

Internal affairs personnel shall maintain a filing system accessible only to unit personnel and the law enforcement executive. Other personnel may be given access based on a specific need, such as a deputy chief in the law enforcement executive's absence. Access to these records must be specifically addressed with department policy and procedures. The list of those authorized to access these files must be kept to a minimum.

Physical security measures also should be taken. This could include securely locked filing cabinets in secured offices. If a law enforcement agency uses computers to maintain internal affairs records of any kind, special security measures must be taken. A stand alone personal computer is the most secure system to limit unauthorized access to internal affair records. If a stand alone computer is not feasible, reasonable measures including the use of firewalls and/or password protected software should be utilized to control access to investigative files and related materials.

Internal Affairs Index File

The purpose of the internal affairs index file is to serve as a record control device. It will maintain an inventory of internal affairs case files and summarize the status of each case for authorized personnel. The instrument used for such an index file will vary by agency and could include a log book, index cards or a computerized data base.

All internal affairs complaints shall be recorded in the index file. Entries should record the basic information on each case, including the subject officer, allegations, complainant, date received, investigator assigned, disposition and disposition date for each complaint. A unique case number assigned to each internal affairs complaint will point to the location of the complete investigation file, and will simplify case tracking.

Investigation Files

An internal affairs investigation file is needed for all internal affairs reports. Given the wide range of internal affairs allegations received by a law enforcement agency, these investigation files might consist of only the initial report form and the appropriate disposition document. On the other hand, investigation files might include extensive documentation of an investigation. The internal affairs investigation file should contain the entire work product of the internal affairs investigation, regardless of the author. This includes investigators' reports, transcripts of statements, and copies of all documents relevant to the investigation. The file should also include all related material from other department incidents as may be applicable. For instance, if an allegation is made of excessive force during an arrest, the internal affairs investigation file should contain copies of the reports from the arrest.

In those cases where an internal affairs investigation results in the filing of criminal charges, the internal affairs file shall be made available to the county prosecutor's office. It will be the responsibility of the county prosecutor's office to decide which items are discoverable and which are admissible. In these cases, the department must follow the instructions of the county prosecutor.

Retention Schedule

Investigative records created during an internal affairs investigation are included in the "Records Retention and Disposition Schedule for Local Police Departments" issued by the New Jersey Division of Archives and Records Management. Under the schedule, files concerning a criminal homicide must be permanently maintained. The schedule also requires any other file involving a criminal matter which resulted in the arrest of the subject officer must be maintained for 75 years. While the schedule further suggests that all other criminal or administrative internal affairs investigative records be maintained for at least five years, agencies should maintain these files as they relate to a particular officer for the career of that officer plus five years.

Agencies are under no obligation to purge their records at the intervals outlined above. Agencies may adopt longer retention schedules if a longer schedule benefits the agency. In the case of internal affairs investigative records, longer retention times will provide agencies with the resources and evidence necessary to assist with the defense of civil lawsuits.

While the internal affairs records of other types of law enforcement agencies are not yet specified by the Division of Archives and Records Management, it would be appropriate for all law enforcement agencies to follow essentially the same retention schedule.

Confidentiality

The nature and source of internal allegations, the progress of internal affairs investigations, and the resulting materials are confidential information. The contents of the internal investigation case files shall be retained in the internal affairs unit and clearly marked as confidential. The information and records of an internal investigation shall only be released under the following limited circumstances:

- In the event that administrative charges have been brought against an officer, and a hearing will be held, a copy of all discoverable materials shall be provided to the officer and the hearing officer in advance of the hearing.
- In the event that the subject officer, agency or governing jurisdiction has been named as a defendant in a lawsuit arising out of the specific incident covered by an internal investigation, a copy of the internal investigation reports may be released to the attorney representing the subject officer, agency or jurisdiction.
- Upon the request or at the direction of the county prosecutor or Attorney General.
- Upon a court order.

In addition to the foregoing, the law enforcement executive officer may authorize access a particular file or record for good cause. The request and the authorization should be in writing, and the written authorization should specify who is being granted access, to which records access is being granted, and for what time period access is permitted. The

authorization should also specify any conditions, such as one in which the files may be reviewed only at the internal affairs office and may not be removed. The law enforcement executive should grant such access sparingly, keeping in mind the purpose of the internal affairs process and the nature of many of the allegations against officers.

Agencies may receive subpoenas directing the production of internal affairs investigative records. Before responding to the subpoena, the police executive or internal affairs investigator should consult with the agency's legal counsel to determine whether the subpoena is valid and reasonable. Invalid or unreasonable subpoenas may be modified or quashed by the court. However, the court will require the agency seeking to modify or quash the subpoena to file the appropriate motion with the court.

If the release of internal affairs documents is appropriate, the agency should inventory the reports they are releasing and obtain a signed receipt.

Reporting

The internal affairs unit should prepare periodic reports for the law enforcement executive that summarize the nature and disposition of all misconduct complaints received by the agency. This report should be prepared at least quarterly, but may be prepared more often as directed by the executive. The report should include the principal officer, the allegation, the complainant, the age, sex, race and other complainant characteristics which might signal systematic misconduct by any member of the department, and the status of the investigation. Concluded complaints should be recorded and the reasons for termination explained. See example in Appendix Q.

This report shall be considered a confidential, internal work product. Dissemination of the report should be limited to command personnel, the county prosecutor, and the appropriate authority.

Requirement 9

The agency must submit to the county prosecutor a report summarizing its internal affairs activity on a form established by the county prosecutor for that purpose.

Every law enforcement agency will report internal affairs activity to the county prosecutor on an internal affairs summary report form. This form simply summarizes the number of cases, by type of case, which were received and disposed of during the reporting period. See the example in Appendix R. Each county prosecutor will provide those law enforcement agencies in his or her jurisdiction with the report forms to be used, instructions on completing the forms, and a reporting schedule.

Honesty is an essential job function for every police officer in New Jersey. Police officers who are not committed to the truth, who cannot convey facts and observations in an accurate and impartial manner and whose credibility can be impeached in a court of law, cannot advance the interests of the State in criminal matters. In addition, defendants in criminal

matters may be entitled to certain evidence in the possession of the prosecutor concerning the credibility of prosecution witnesses including police officers. Prosecutors are considered to be in possession of such evidence even when information concerning the honesty of individual officers is created and maintained by law enforcement agencies. Furthermore, prosecutors may be required to provide such evidence to the court.

Therefore, it is imperative that the internal affairs investigator assist prosecutors with their legal duty to review and, if necessary, disclose evidence that may impact the credibility of police officers. Thus, the following matters shall be reported to the county prosecutor so that he or she may evaluate the relevance of the material:

1. a finding that a police officer has filed a false report or submitted a false certification in any criminal, administrative, employment, financial or insurance matter in his or her professional or personal life;¹⁰
2. a pending court complaint or conviction for any criminal, disorderly persons, petty disorderly persons, municipal ordinance or driving while intoxicated matter;
3. a finding that undermines or contradicts a police officer's educational achievements or qualifications as an expert witness;
4. a finding of fact by a judicial authority or administrative tribunal that is known to the officer's employing agency which concludes that a police officer intentionally did not tell the truth in a matter;
5. a sustained finding that a police officer intentionally mishandled or destroyed evidence; and
6. a sustained finding that a police officer is biased against a particular gender or ethnic group.

The fact that law enforcement agencies report the above-listed incidents to the prosecutor's office does not constitute a mandate or requirement that the information be disclosed to the court. Prosecutors should conduct an independent review the information provided to determine whether the information needs to be disclosed to the court and whether the officer can participate in the prosecution of criminal cases. Once a decision is reached with respect to a particular case or

¹⁰ This provision is not intended to require that law enforcement agencies initiate internal affairs investigations into the accuracy of every statement, report or certification that may be filed with respect to civil litigation including matrimonial and employment matters or any other personal or financial matters not directly related to the officer's employment. In most cases, such investigations would be inappropriate. Determinations as to the credibility of statements or certifications made in the context of litigation should be made by the courts or administrative tribunals. Determinations as to the credibility of statements or certifications in other personal or financial matters should be addressed if they arise in the context of an ongoing internal affairs investigation.

defendant, the prosecutor shall discuss his or her decision with the internal affairs investigator and the law enforcement executive if necessary. If it is determined that an officer cannot participate in a criminal prosecution, the prosecutor must advise the agency whether the officer's disability is limited to a particular case, a particular category of cases or all criminal matters.

Requirement 10

Each agency must release reports to the public summarizing the allegations received and the investigations concluded for that period. In addition, agency shall periodically release a brief synopsis of all complaints where a fine or suspension of ten days or more was assessed to a member of the agency.

An annual report summarizing the types of complaints received and the dispositions of the complaints shall be made available to the public. This report can be statistical in nature. The names of complainants and subject officers shall not be published in this report.

In addition, each agency shall periodically release a brief synopsis of all complaints where a fine or suspension of ten days or more was assessed to a member of the agency. The synopsis shall not contain the identities of the officers or complainants. However, it should briefly outline the nature of the transgression and the fine or suspension imposed. An example of a synopsis may be found in Appendix V.

Personnel Records

Personnel records are separate and distinct from internal affairs investigation records. Internal affairs investigation reports shall never be placed in personnel records. When a complaint has a disposition of exonerated, not sustained, or unfounded, there shall be no indication in the employee's personnel file that a complaint was ever made.

In those cases where a complaint is sustained and discipline imposed, the only items to be placed into the employee's personnel file are a copy of the administrative charging form and a copy of the disposition form. As an example of this type of document, see the form DPF-31B found in Appendix P. No part of the internal affairs investigation report shall be placed in the personnel file.

Risk Management Procedures

In order to enhance its integrity, provide an optimal level of service to the community and reduce its exposure to civil liability, every law enforcement agency should establish procedures for dealing with problem employees. Recent court decisions, particularly those involving federal civil rights lawsuits which allege a deliberate indifference on the part of the agency towards citizen complaints, have made it clear that law enforcement agencies have a duty to monitor the behavior of their employees. Furthermore, these same court decisions expect law enforcement agencies to establish mechanisms that provide the internal affairs unit and the police executive with the ability to track the complaint records of individual officers and identify those officers with a disproportionate number of complaints against them. The courts also expect law enforcement agencies to utilize the information developed by these mechanisms to prevent individual officers from engaging in conduct or behavior that violates the constitutional liberties enjoyed by every member of the community. In addition, it is expected that law enforcement agencies will utilize the information to prevent patterns, practices or trends of inappropriate behavior or conduct from developing.

Any mechanism or procedure established by a law enforcement agency to monitor and track the behavior and performance of individual police officers must have as two of its linchpins quality supervision and an objective and impartial internal affairs process. Supervisors who have sufficient time and resources to properly perform their duties should be able to identify officers with performance and misconduct issues in a timely fashion. Supervisors can react to problems they identify through direction, counseling and effective performance evaluations. Proper training of agency supervisors is critical to the discipline and performance of law enforcement officers. Emphasis should be placed on anticipating problems among officers before they result in improper performance or misconduct. Supervisors are expected to recognize potentially troublesome officers, identify training needs of officers, and provide professional support in a consistent and fair manner.

The internal affairs process represents the agency's response to allegations and complaints that have been brought to the agency's attention either by agency employees or members of the public. Law enforcement agencies must establish and implement a process of investigation and review that is both meaningful and objective. The process must be "real". It must provide the citizen with "at least a rudimentary chance of redress when an injustice is done." It is not enough for police executives to adopt a policy governing the receipt, investigation and resolution of complaints of officer misconduct. The policy must be implemented and executed with a commitment to the integrity of the agency and the constitutional rights of the citizenry. Agencies with an objective and fair internal affairs process will limit their risk of civil liability. Agencies with a superficial or shallow internal affairs process run the risk of significant civil liability.¹¹

Law enforcement agencies may also wish to consider implementing a specific mechanism to track employee behavior. These mechanisms have been called several things, but the most common term is "early warning system." An early warning system should be designed to identify any pattern or practice by any member of the agency which warrants intervention or remediation before it develops into a glaring problem.

¹¹ *Beck v. Pittsburgh*, 89 F.3d 966

Many different measures of officer performance can be regularly examined for any of these patterns or practices. Some of the measures that should be considered for their suitability for inclusion in the "early warning system" are:

- Motor vehicle stop data
- Search and seizure data
- Internal complaints, regardless of outcome
- Civil actions filed, regardless of outcome
- Incidents of force usage, including firearms discharges and use of non-deadly force
- Claims of duty-related injury
- Arrests for resisting arrest
- Arrests for assault on a law enforcement officer
- Criminal investigations or complaints made against the member
- Incidents of arrested persons injured
- Vehicular pursuits
- Vehicular accidents
- Cases rejected or dismissed by the prosecutor
- Evidence suppressed by the court

This information should be maintained to facilitate analysis with respect to individual members, supervisors, squads, districts and assignments, and the agency as a whole. Depending on the size of the agency and the complexity of this data, computerized software that utilizes mathematical algorithms may be best suited to assist in revealing the presence of particular patterns of incidents. However, not all law enforcement agencies have the computer capabilities for such an in-depth screening process. At a minimum, every law enforcement agency should establish a protocol for tracking employee behavior and reviewing all internal affairs complaints made against its officers, regardless of outcome, for evidence of a pattern or practice of inappropriate or unconstitutional conduct.

The "early warning system" should be the responsibility of the internal affairs unit. By virtue of its other responsibilities and placement in the organizational structure, the internal affairs unit is best able to maximize the benefits of an early warning system.

If the review points toward the emergence of a pattern, practices or trend of inappropriate behavior or misconduct, the internal affairs investigator shall consult with the appropriate supervisor. The investigator and the supervisor shall review the information provided by the early warning system along with any other relevant information from department records for the purpose of initiating a course of supervisory action designed to interrupt the emerging pattern, practice or trend. If the review indicates that the early warning system has returned a "false positive," that conclusion should be documented.

If the review reveals that an officer has violated department rules and regulations or standard operating procedures, the supervisor in consultation with the internal affairs unit should proceed with an internal investigation and possible disciplinary action.

If the review reveals that the officer has engaged in conduct which indicates a lack of understanding or inability to comply with accepted procedures, the supervisor shall consult with the

internal affairs unit to determine the appropriate course of remedial action. Remedial intervention may include training, retraining, counseling and enhanced supervision. In addition, the actions of the officer may indicate a question about the officer's fitness for duty. In that case, the officer should be examined for his fitness for duty, either physically or psychologically. Internal disciplinary action, remedial action, and fitness for duty examinations are not mutually exclusive, and should be jointly pursued if appropriate.

When remedial action has been undertaken, the internal affairs unit should be formally notified of such efforts. This information shall be recorded in the internal affairs index file system. No entry should be made in the employee's personnel file, unless the action results in disciplinary action. If the remedial action was an appropriate training program, attendance and completion of that program should be noted in the officer's training record.

In addition to the regular, automated review by the early warning system, the internal affairs unit should query the early warning system and review an individual employee's history any time a new complaint is made. Using this information and their experience, internal affairs investigators may be able to identify employees who may need counseling, training or other remediation even before such is indicated by the early warning system's ongoing data review.

It must be noted that the purpose of an early warning system is to detect patterns and trends before the conduct escalates into more serious infractions. As such, employees must understand that the early warning system is not identical to the disciplinary process. Although it is possible that disciplinary action may be taken as the result of evidence that rules and regulations were violated, this is not the sole or even primary intent of the system. The primary intent of an early warning system is to address potential problems through the use of appropriate management and supervisory strategies before formal discipline is warranted.